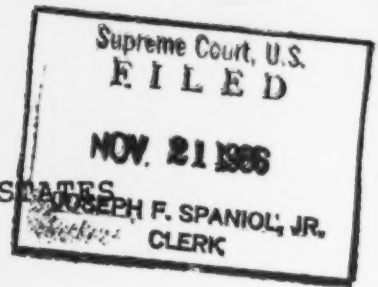


2
No. 86-850

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986



MICHAEL THEODORE BENSON and
NANCY JOY BENSON, his wife,

Petitioners

v.

ANNE RAUSEO and
CHARLES EDWARD MENTZER,

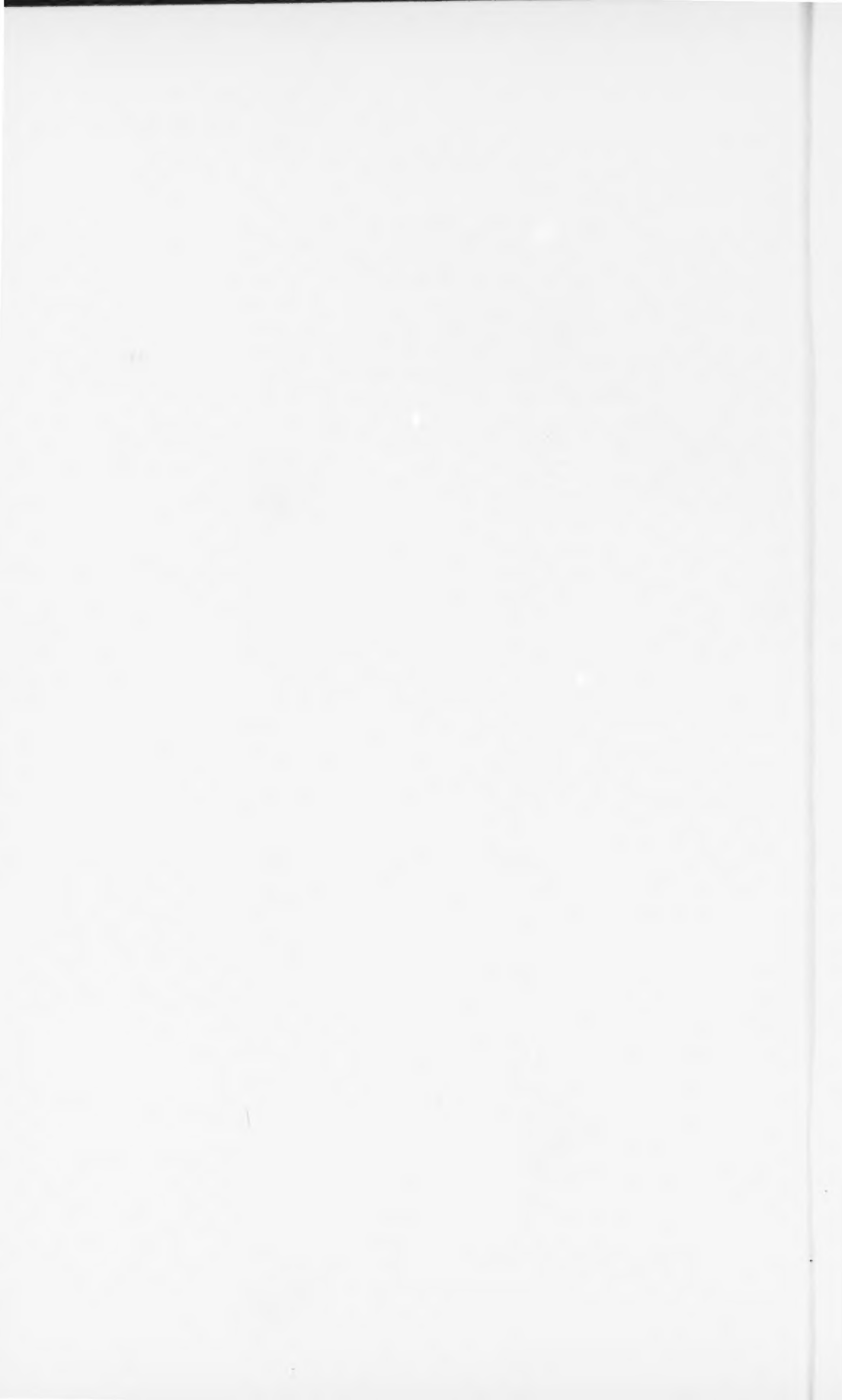
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

MICHAEL T. BENSON
2703 Waco Court
Baltimore, MD 21209
(301) 484-0358
Counsel of Record
and for Petitioners

November 21, 1986

62 pp



QUESTIONS PRESENTED

1. Prior to oral argument of petitioners' appeal, a clerk from the Court of Special Appeals of Maryland (CSA), an intermediate state appellate court advised undersigned counsel that a judge who adjudicated part of the appealed case in the trial court would sit in at oral argument only, and an alternate judge would substitute for that judge in writing the opinion. At the start of oral argument, that judge in the presence of the panel was reminded that he adjudicated a material part of the case in the trial court, and said his prior participation would not affect his ability (or impartiality) to decide the appeal correctly. Subsequently, that judge participated in writing a CSA opinion adverse to Petitioners on surprise grounds (which petitioners believe are in conflict with and

are unsupported by state law), and participated in the panel's denial (without explanation) of Petitioners' Motion for Reconsideration: (1) arguing that the CSA opinion's reasoning is inapplicable, and conflicts with other state appellate case law, and (2) declining to raise a Federal Constitutional question therein about the judge's participation. Petitioners felt that raising such questions in the motion about his role in the appeal would have been inappropriate, and perhaps disrespectful because the panel had the opportunity to reverse its decision, and the judge had also been reminded of a conflict of interest by the CSA's chief deputy clerk. Petitioners continued to rely in good faith on the judge's assertion about deciding the appeal correctly. Under the circumstances described above, did Petitioners knowingly, voluntarily,

and intelligently waive their rights for decision of the appeal by the 3-judge panel as constituted?

2. Maryland's Constitution, Article IV, Section 15 disqualifies a judge from sitting in an appeal of a case in which he was a trial court judge. Federal Constitutional issues of 14th Amendment due process right to an impartial tribunal, and right to equal protection of the laws as applied to Petitioners were first raised in the Court of Appeals of Maryland (CA), the state's highest court which declined to decide them on the merits. If the answer to question no. 1 is "No", should this Court remand the case to the CSA for a rehearing by a qualified panel of judges based on error sufficiently serious as to constitute unfairness in the proceedings (plain error)?

3. Maryland Procedure Rule 810 provides that the sole method of review in the CA is by certiorari. Commentary to the rule states that elsewhere in the Rules volumes, a page lists statutes giving a right of appeal to the CA. That "exceptions" page is omitted from the volumes. The rule in light of its omitted exceptions appears vague as to when an aggrieved party has the right to appeal to the CA. The Federal Constitutional defects born in the CSA as explained in question no. 1, were raised in petitioners' certiorari petition to the CA. Rule 810 precludes petitioners from the right to appeal those defects to the CA. If the answer to question no. 1 is "No", did Rule 810 enforced as applied to Petitioners violate their 14th Amendment due process rights when the CA denied their certiorari petition?

4. Maryland Constitution, Article IV, Section 15 mandates that a trial court judge shall not be an appellate judge in the same case on appeal. No statute specifically prohibits a Maryland appellate court's panel from containing a judge who participated in the trial court in the same case on appeal. After pursuing all available procedural routes in the appeal to no avail, Petitioners, pursuant to Maryland Rule BE40 filed a complaint for mandamus in the CA, the sole court of superintending competent jurisdiction, requesting it to order the CSA to provide petitioners a rehearing by a qualified panel of judges in their appeal. The CA denied the "petition" without opinion on the merits of the complaint. Under those circumstances, is the CA's denial arbitrary and violative of petitioners' 14th Amendment due process rights?

LIST OF PARTIES

In the Circuit Court for Baltimore County, the trial court, the parties to the proceedings below were petitioners Michael Theodore Benson and Nancy Joy Benson, his wife, Defendants in a civil suit filed against them by respondent Anne Rauseo, Plaintiff. Petitioners were CounterPlaintiffs. Respondents, Anne Rauseo and Charles Edward Mentzer were CounterDefendants. In the countersuit, petitioners were appellants, and respondents were appellees in the CSA. In the CA, petitioners and respondents had the same designations as in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	vi
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS STATUTES	
AND RULES INVOLVED.	3
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT.....	16
I. The manner in which the appellate proceeding was conducted is in conflict with prior decisions of this Court, caused petitioners to raise Federal Constitutional questions without a right to a decision on their merits, and based on the evidence, facts and law applicable to the underlying appeal, the CSA decision was erroneous.....	
II.If the CSA is found to have erred in the grounds for its opinion, this Court should remand this case for a trial on the merits because the trial court's grounds for its decision conflicts with a prior decision from this Court.....	22

III. When the constitutionality of a rule of the highest court of a state is challenged as affecting an aggrieved party's substantial rights, and that rule is applied by that court to avoid decision on the merits of that party's Federal Constitutional questions, the aggrieved party ought to have the right to appeal to this Court, and not be subject to this Court's discretion for review.....25

IV. Whether a statute's language is clear or implied, a writ of mandamus is appropriate to compel the performance of a ministerial nondiscretionary act, the nonperformance of which deprives aggrieved parties of substantial constitutional rights.....27

CONCLUSION.....29

APPENDIX

Circuit Court for Baltimore County
Partial Summary Judgment Order and
Opinion of April 10, 1981.....1a

Circuit Court for Baltimore County
Motion for Summary Judgment
Opinion at June 11, 1985 hearing.....3a

Circuit Court for Baltimore County
Motion Alter, Amend, or Revise
Summary Judgment Orders
Opinion at July 12, 1985 hearing.....6a

Court of Special Appeals of Maryland
April 22, 1986 Opinion.....9a

Court of Special Appeals of Maryland
denial of Motion for Reconsideration
by letter of May 15, 1986.....19a

Court of Appeals of Maryland
July 24, 1986 Order denying
petitioners' certiorari petition.....20a

Court of Appeals of Maryland October
7, 1986 Order denying Mandamus.....21a

TABLE OF AUTHORITIES

Cases:

Archway Motors, Inc. v. Herman, 394 A2d 1228 (1978).....	23, 24
Bogley v. Middleton Taverns, 400 A2d 15 (1980).....	12, 13
Brookhart v. Janis, 384 U.S. 1 (1966)...	25
Cuyler v. Sullivan, 446 U.S. 335 (1980).	24
In Re Murchison, 349 U.S. 133 (1955)....	20
Keys v. Chrysler Credit Corp., 494 A2d 200 (1985).....	22
Moran v. Dillingham, 174 U.S. 153(1899).	20
NAACP v. Alabama, 357 U.S. 449 (1958)...	29
Palmer Ford, Inc. v. Wood, 471 A2d 297 (1984).....	23, 24
Poller v. Columbia Broadcasting Corp, 368 U.S. 464 (1962).....	26, 27
U.S. v. Emholt, 105 U.S. 414 (1881).....	20
U.S. v. Will, 449 U.S. 200 (1980).....	20
Wood v. Georgia, 450 U.S. 272 (1981)....	25

Other Authority

55 C.J.S. Mandamus, Section 55.....	31
-------------------------------------	----

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

MICHAEL THEODORE BENSON, and
NANCY JOY BENSON, his wife, Petitioners

v.

ANNE RAUSEO and
CHARLES EDWARD MENTZER, Respondents

MICHAEL THEODORE BENSON, and
NANCY JOY BENSON, his wife, Petitioners

v.

COURT OF SPECIAL APPEALS OF MARYLAND,
Respondent

JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

The Petitioners Michael Theodore
Benson and Nancy Joy Benson his wife
respectfully pray that a writ of certio-
rari issue to review the judgments of the
Court of Appeals of Maryland entered in
the above-entitled proceedings on July
24, 1986 and on October 7, 1986.

OPINIONS BELOW

Reproductions of the following are included in the appendix to this petition:

Circuit Court for Baltimore County
(Judge Paul Alpert) April 10, 1981 opinion
and Partial Summary Judgment Order for
Respondents in Petitioner Rauseo's case.

Circuit Court for Baltimore County
(Judge William Nickerson) transcribed
hearing opinions on Respondents' Summary
Judgment Motions on June 11, 1985 and on
Petitioners' Motion to Alter, Amend, or
Revise Summary Judgments on July 12, 1985.

CSA April 22, 1986 unreported opinion
(Judges Alpert, Karwacki, and Wenner).

CSA May 15, 1986 letter denying
Petitioners' Motion for Reconsideration.

CA's July 24, 1986 Order denying Pet-
itioners' Certiorari petition to the CSA.

CA's October 7, 1986 Order denying
Petitioners' Mandamus Complaint.

All page references to the appendix
are in parens followed by the letter "a."

JURISDICTION

The CSA rendered its opinion and judgment of April 22, 1986, affirming the Circuit Court for Baltimore County Summary Judgment Orders entered on June 11, 1985 in favor of Respondents in a countersuit, and on May 15, 1986 denied Petitioners' timely filed Motion for Reconsideration.

The CA denied Petitioners' certiorari petition by Order dated July 24, 1986.

The CA denied Petitioners' Mandamus Complaint by Order dated October 7, 1986.

On October 15, 1986, Chief Justice Rehnquist ordered that the time for filing this petition for writ of certiorari be extended to and including November 21, 1986.

On November 3, 1986, Petitioners mailed to the CA a Motion for Reconsideration (still pending) of its denial of the Mandamus Complaint.

The jurisdiction of this Court to review the judgments of the CA is invoked under 28 U.S.C. Sections 2106 and 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES,
AND RULES INVOLVED

Maryland Civil Procedure Rule 810

"Method of Securing Review---By Writ of Certiorari.

The sole method of securing review by this Court is by writ of certiorari."

NOTE: Above the title of Rule 810 is the phrase,

"Method of Securing Review---Times for Taking*"

Underneath annotations below the quoted rule is the sentence,

"* See Appendix A for list of statutes giving a right of appeal to the Court of Appeals."

No Appendix A appears with the Maryland Rules of Civil Procedure volumes.

Maryland Civil Procedure Rule BE40

"An action for a writ of mandamus shall be commenced by the filing of a complaint under oath, the form and contents of which shall comply with Rules 2-303 through 2-305, except that a prayer for general relief shall not be permitted."

Maryland Constitution, Article IV,
Section 15:

"Any judge of the Court of Appeals or of an intermediate appellate court of appeal who heard the cause below either as a trial judge or as a judge of any intermediate court of appeal as the case may be shall not participate in the decision.---"

U.S. CONSTITUTION, AMENDMENT XIV

"---nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

RULES OF THE SUPREME COURT

Rule 23.1

Disposition of Petition for Certiorari

"After consideration of the papers distributed pursuant to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits."

STATEMENT OF THE CASE

Anne Rauseo sued the Bensons for fraud alleging that she was caused to spend great sums for repairs and replacements to a house that the Bensons conveyed to her. At a preliminary hearing, the trial court, the Circuit Court for Baltimore County, Maryland (Judge Paul Alpert) ordered by partial summary judgment that a dryer among other things was not at issue (1-2a). At a settlement conference on the day set for trial, Anne Rauseo's attorney, Charles Edward Mentzer stated to the Bensons that Anne Rauseo intended to testify that the dryer in the conveyed house was switched between contract date and settlement date. The Bensons protested vociferously that the proffered testimony was false, however Mr. Mentzer insisted she would so testify. When reminded about the partial

summary judgment order that the dryer was not at issue, Mr. Mentzer said that he disagreed with the order and intended to appeal it. Undersigned counsel felt that his grounds for appeal might be sufficient for the order to be reversed. Not being certain who a jury would believe, the Bensons felt coerced to agree to settle with Anne Rauseo whereby the Bensons would pay her \$1,500 within 90 days of the settlement conference date and she would dismiss her suit with prejudice. Subsequently, the Bensons discovered in pleadings in a case between Anne Rauseo and her son that she answered interrogatories under oath stating that she paid nothing toward repairs of the house. The Bensons filed a motion to set aside the settlement agreement and the parties agreed to rescind it, however the trial court denied the motion and entered judgment.

ment in favor of Anne Rauseo for \$1,500 plus costs. The Bensons appealed the judgment, paid interest to borrow most of \$2,137.00 that was deposited with the trial court as a supersedeas bond to stay execution of Rauseo's judgment after Mr. Mentzer propounded to the Bensons interrogatories in aid of execution. The Bensons incurred significant damages in appealing that judgment, and the CSA reversed it and remanded the case to the trial court for a trial.

With leave of the trial court, the Bensons countersued Anne Rauseo for abuse of process alleging that she used her attorney to extort a settlement agreement by telling him that a dryer was switched between contract date and settlement date of the house's conveyance when she knew very well it wasn't. The trial court denied her motion to dismiss for failure to state a claim upon which relief can be

granted. The Bensons amended their countersuit by adding Anne Rauseo's attorney, Mr. Mentzer as a CounterDefendant and sued both for abuse of process and civil conspiracy to abuse process, alleging that both CounterDefendants knew that Rauseo spent nothing on repairs or replacements to the house, and didn't want that information divulged at trial as their ulterior motive to extort a settlement from the Bensons. A basis for Mr. Mentzer's knowledge or reason to know that Anne Rauseo's purportedly proffered testimony about the dryer was false was that Mr. Mentzer had an inspection report of the conveyed property done between contract date and settlement date that indicated that the dryer on contract date and on settlement date of the conveyance of the house was the same appliance. The trial court denied CounterDefendants' motions to dismiss for failure to state a claim upon which relief could be granted.

The CounterDefendants moved for summary judgment on the grounds that nowhere in the Bensons' depositions was there anything to show that Mr. Mentzer acted in any capacity other than as Rauseo's attorney, and that no money was paid to any of the CounterDefendants. The Bensons do not dispute that claim and presented to the court conflicting statements in depositions and in other statements from the alleged abusers and conspirators. Anne Rauseo, when asked at her July 30, 1984 deposition if she told Mr. Mentzer that the dryer was switched between contract date and settlement date replied,

"I am trying to think of a sensible answer. I believe I did. No, I didn't say anything to you, no."

"You" referred to Mr. Mentzer who was present at the deposition.

Mr. Mentzer certified as mailing on July 3, 1984 Answers to Requests for Admission of Facts and Genuineness of Documents propounded to Anne Rauseo and containing the answer, "Admitted" to a Request for Admission of Fact

"That you told Charles Edward Mentzer before June 3, 1982 that a different dryer was left at (the house) on settlement date than on contract date."

Undersigned counsel received a copy of those answers signed by Mr. Mentzer in his capacity as Anne Rauseo's attorney.

At Michael Benson's October 1, 1984 deposition, Mr. Mentzer stated that he didn't sign answers to Requests for Admissions on behalf of Anne Rauseo and that she signed her own.

Undersigned counsel checked the trial court's file and found a page containing what purports to be Anne Rauseo's signature, and on the basis of having seen her signature in papers in the trial court's record and in various papers, believes it is not genuinely hers.

Mr. Mentzer, when asked at his July 30, 1984 deposition if Anne Rauseo told him that the dryer was switched between contract date and settlement date answered,

"Objection, violative of attorney-client privilege. The answer is I don't recall what she said in regards to the dryer."

At a hearing on the motions, argument on behalf of CounterDefendants was advanced on the attorney's agency theory and on the theory that no damages were paid to the alleged tortfeasors.

Undersigned counsel argued that whether damages were paid to the alleged tortfeasors is immaterial because it is sufficient if the Bensons could show that they incurred damages and pointed out case law to that effect. Undersigned counsel also argued that the agency argument is immaterial on the basis of no immunity for intentional torts committed

by the attorney and/or client during the scope of the agency. Undersigned counsel also submitted the aforementioned written and transcribed statements, and mentioned his suspicion of a forged signature on Rauseo's answers to Requests for Admission of Facts. The trial court judge granted the summary judgment motions as to both CounterDefendants saying that Mr. Mentzer as a disclosed principal as Anne Rauseo's attorney would be exonerated from any personal responsibility, and cited a case, Bogley v. Middleton Taverns, 400 A2d 15 (1980) in which that principle evolved from an agent's negligence (3-5a) and not from an intentional tort. At a jury trial of the fraud case, the trial judge granted the Bensons' Motion for Judgment finding that Anne Rauseo did not show any evidence that the Bensons intended to defraud her. Anne

Rauseo also testified that the same dryer was at the house on contract date and on settlement date. The Bensons filed the equivalent of a motion for reconsideration on the summary judgment orders on the countersuit and at a hearing thereon the judge stated that undersigned counsel may well be correct about the inapplicability of Bogley, supra, (6-8a) cited at the hearing on the motions for summary judgment, yet he denied the motion and affirmed his prior decision (8a). The Bensons appealed the summary judgment orders in the countersuit to the CSA.

The parties filed briefs. The Bensons' brief contained one argument, i.e.,

"The Orders for Summary Judgment in favor of Appellees should not have been issued because the trial court's stated basis in law that an agent for a disclosed principal is not liable in negligence is not applicable to the intentional tort Counterclaim, and because evidence

of the alleged abusers' and co-conspirators' statements submitted to the trial court sufficiently demonstrates genuine dispute as to material fact or permits more than one inference of Appellees' motive, intent, or knowledge."

On the morning of oral argument, a CSA clerk advised counsel for Petitioners that Judge Paul Alpert and 2 others would sit in at oral argument, but that a different judge and those 2 others would write the opinion. When the 3-judge panel entered the courtroom, undersigned counsel stated that Judge Alpert made a material decision in the trial court and it's unusual to see a judge from the trial court participate in the same case on appeal. The CSA Chief Deputy Clerk reminded Judge Alpert of his prior participation in the trial court proceedings of that case, however Judge Alpert stated that his prior participation would not affect his ability (the word might have been "partiality") to make a correct

decision in the case on appeal. From a compelling influence, undersigned counsel made no further objection, didn't want to make it seem that he disrespectfully thought that the judge could not decide the appeal correctly, felt certain that he could decide the appeal correctly, and expected that the appeal would be decided on points argued in the court below and in the appellate briefs. The oral argument was held and the opinion was attributed to Judge Alpert and the 2 others at oral argument and not to a different judge and the 2 others (as the CSA clerk had stated). The opinion was adverse to the Bensons (9-18a), affirmed the trial court's decision on grounds different than those given in the trial court, and did not relate to arguments in the trial court or in the appellate briefs, i.e., CounterPlaintiffs (Appellants) did not

meet the special damage element for abuse of process, and without abuse of process, the civil conspiracy count must fall.

The Bensons submitted a Motion for Reconsideration pointing out much Maryland appellate case law which conflicts with the reasoning given in the CSA opinion. Petitioners felt it would be inappropriate and perhaps disrespectful in their Motion for Reconsideration to raise Constitutional questions about Judge Alpert's participation in the CSA panel when he said he could decide the appeal correctly, since the decision of the motion was an ongoing part of the decision in the appeal. The opinion omitted to point out that special damages required to prove abuse of process is not limited to arrest or seizure of property but also includes other special injury such as the deprivation of use, possess-

ion, or enjoyment of Plaintiff's property. Petitioners also argued that when they paid interest to borrow money to deposit \$2,137.00 with the trial court as a supersedeas bond to stay execution of Anne Rauseo's judgment pending their first appeal to the CSA, they incurred the type of special damages necessary to prove abuse of process. Petitioners further argued that the CSA opinion contained a statement of the law about special damages which the CA in another case clarified, and that clarification wasn't cited in the CSA opinion. The CSA denied the motion without explanation (19a).

The Bensons submitted a petition for writ of certiorari in the CA and argued that they were denied the same Constitutional rights as those argued in this petition, and raised jurisdictional and other Constitutional issues.

Petitioners also argued that in light of the Constitutionally defective proceedings in their CSA appeal, and in light of the CA providing the right to appeal in numerous instances, Rule 810 violates their 14th Amendment due process rights because they have no right of appeal and can only obtain a review of their appeal at the CA's discretion. Respondents answered that an adequate ground existed for the CSA decision and that the Bensons waived their rights to another judge as a substitute for Judge Alpert by not objecting at oral argument and by not raising the Federal Constitutional questions in their Motion for Reconsideration filed in the CSA. The Maryland Rules of Civil Procedure do not provide for an answer to an answer to a certiorari petition which the CA denied saying that there has been no showing that review by certiorari is desirable and in the public interest (20a).

On August 22, 1986, petitioners mailed to the CA, a complaint for writ of mandamus requesting the CA to order the CSA to grant them a rehearing by a qualified panel of judges. The CA denied the "petition" by Order of October 7, 1986 (21a).

REASONS FOR GRANTING THE WRIT

I.

The manner in which the appellate proceeding was conducted is in conflict with prior decisions of this Court. caused Petitioners to raise Federal Constitutional questions without a right to a decision on their merits, and based on the evidence, facts and law applicable to the underlying appeal, the CSA decision was erroneous.

This Court has looked with disfavor on tribunals containing judges who tried a case in a trial capacity and subsequently in an appellate capacity. See: U.S. v. Emholt, 105 U.S. 414 (1881), In Re Murchison, 349 U.S. 133 (1955), and U.S. v. Will, 449 U.S. 200 (1980). In the context of a trial judge adjudicating an unappealed part of a case on appeal and later participating in an appellate tribunal in that case, this Court has also looked with disfavor on such an appellate proceeding. See: Moran v. Dillingham, 174 U.S. 153 (1899).

With regard to the appellate proceeding, Petitioners categorize their reminder to the subject judge that he made a material decision in the case in the trial court as an objection to his sitting in the same case on appeal.

With regard to Petitioners' declining to raise federal Constitutional issues about the judge's participation in the tribunal in their Motion for Reconsideration on surprise grounds, Petitioners considered their motion as part of the ongoing appeal. Therefore, to ask for the judge's recusal at that time would have been inappropriate in light of the time each of the judges spent on the appeal. Petitioners expected at least a comment from the CSA on their reasoning in the motion because it covered grounds not argued in the trial court, not discussed by the trial court judge, and not argued in the appellate briefs. When the unexpected denial without explanation issued, that is when Petitioners felt the whole CSA proceeding was tainted by the possibility of a conflict of interest.

Petitioners see the CSA opinion as erroneous because when they paid interest to borrow money to deposit \$2,137.00 with the trial court to stay execution of the judgment resulting from a tortiously obtained settlement agreement (when the first appeal to the CSA was pending), they expended money to obtain money which they were deprived of using or possessing for nearly a year.

Keys v. Chrysler Credit Corp., 494 A2d 200 (1985) cited in the CSA opinion (14-16a) also provides that the special damage requirement for abuse of process is satisfied by the deprivation of use, possession, or enjoyment of Plaintiff's property. The opinion omits to state that and holds that arrest or seizure of property are the only types of special damage that satisfy the damage element of abuse of process in Maryland. Even if other forms of special damage to satisfy

the abuse of process tort could not be used, petitioners dispossession of \$2,137.00 against their will for nearly a year (after the trial court signed an order compelling petitioners to answer interrogatories in aid of execution) qualifies as a constructive, if not an actual seizure. The entire crux of the CSA opinion's reasoning lies in footnote 2 (18a), which in substance says that Petitioners' filing of a bond is not a seizure of their property and is normally associated with litigation expense. The opinion claims support from Archway Motors'v. Herman, 394 A2d 1228 (1978) in which the CSA decided that attorneys fees in successfully contesting a breach of contract case were not recoverable. In Archway, supra, no actionable tort was committed. In Palmer Ford, Inc. v. Wood, 471 A2d 297 (1984),

the CA by implication stated that attorneys fees were recoverable when an abuse of process was accompanied by an arrest. In the instant case, the alleged torts and mode of special damages are consistent with Palmer Ford, Inc., supra, and inconsistent with Archway, supra.

When Judge Alpert ordered the dryer not at issue in the trial court, when the proffered testimony about it was material to the countersuit, and when Respondent Mentzer advised that he intended to appeal the Order about the dryer (He didn't.), Judge Alpert's perspective on the appeal could not possibly be like that of a new judge to the appeal. In Cuyler v. Sullivan, 446 U.S. 335 (1980), this Court mandated a reversal when a trial court "knows or reasonably should know that a particular conflict exists" id @ 347. The panel knew about a con-

flict of interest because it was put on notice of it by undersigned counsel and by the CSA's chief deputy clerk. In Wood v. Georgia, 450 U.S. 261 (1981), this Court said that a hearing below should be held to determine whether a conflict of interest actually existed when several Defendants were represented by the same counsel. If there was a conflict of interest, there was no valid waiver of a right, and the Federal Constitutional question was not raised below. In Brookhart v. Janis, 384 U.S. 1 (1966), this Court stated that there is a presumption against the waiver of Constitutional rights. Surprise grounds for the CSA decision would negate any knowing waiver to the judge's participation. A finding of error in the CSA decision would uphold the presumption against waiver. In light of this

Court's disfavor with appellate tribunals containing trial judges who participated in the same case, this action at a minimum warrants a remand to the CSA for a rehearing on the merits by a qualified panel of judges.

II

If the CSA erred in the grounds for its opinion, this Court should remand this case for a trial on the merits because the trial court's grounds for its decision conflicts with a prior decision from this Court.

Lack of comment in the CSA opinion about the trial court's reasoning implies to Petitioners that the CSA believed the appellants' brief argument, supra, to be correct. That argument is consistent with Poller v. Columbia Broadcasting

Co., 368 U.S. 464 (1962) in which this Court cautioned against Summary Judgment where motive and intent play leading roles because

"---the proof is largely in the hands of the alleged conspirators."

With conflicting sworn statements in evidence before the trial judge, the evidence points to a great deal of dispute as to material fact as to respondents' motive, intent, or knowledge, thus rendering summary judgment inappropriate. Because that decision conflicts with Poller, supra, this Court can exercise its authority under Rule 23.1 to summarily dispose of it by remanding it to the trial court for a trial on the merits without the need for a rehearing in the Maryland appellate court system.

III

When the constitutionality of a rule of the highest court of a state is challenged as affecting an aggrieved party's substantial rights, and that rule is applied by that court to avoid decision on the merits of that party's Federal Constitutional questions, the aggrieved party ought to have the right to appeal to this Court and not be subject to this Court's discretion for review.

Petitioners have challenged the constitutionality of Maryland Civil Procedure Rule 810 when the CA declined to review their certiorari petition raising Federal Constitutional questions about their proceeding in the CSA which rendered a decision on the merits without a Federal Constitutional question being raised.

Had the CA decided petitioners' constitutional challenge to Rule 810 on the merits adversely to them, or had the CA been obligated to take the appeal and refused to decide it, it appears that petitioners would have the right to appeal the decision or non-decision to this Court, rather than to be subject to this Court's discretion.

In NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958), this Court reviewed a state court judgment when the highest court in Alabama denied certiorari to consider constitutional issues underlying that judgment.

In the instant case, since the applicability of the CA's certiorari rule is constitutionally at issue, and the CA avoided decision on it, the non-decision should be treated as one the CA should have been obligated to decide thus giving petitioners the right to appeal to this Court.

Consideration of the matter by this Court is essential to clarify when denials of certiorari petitions by the highest Courts of states will warrant aggrieved parties the right to appeal their non-decision to this Court.

IV

Whether a statute's language is clear or implied, a writ of mandamus is appropriate to compel the performance of a ministerial nondiscretionary act, the nonperformance of which deprives aggrieved parties of substantial Constitutional rights.

Maryland Constitution, Article IV, Section 15 says by implication that the CSA had a ministerial, nondiscretionary duty to provide petitioners with a panel of 3 judges who had not participated in trial court proceedings of the same

case. The CSA's failure to do so denied substantial Federal Constitutional rights of petitioners.

Nothing precludes the CA from exercising its jurisdiction to issue a writ of mandamus, a common law right of petitioners not negated by statute.

Maryland Procedure Rule BE40 provides that a mandamus action is commenced by filing a complaint which is what petitioners did. The CA's denial of a "petition" without opinion is untenable.

If a writ is sought to compel an act not enjoined by statute, there must be a deprivation of a substantial constitutional right. See: 55 C.J.S Section 55, p 96, col. 2.

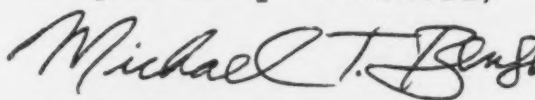
This Court's guiding authority is needed to show that mandamus is an appropriate remedy to compel a state

institution to refrain from doing something which would cause a deprivation of substantial Constitutional rights which a statute impliedly enjoins.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted. If petitioners are correct in urging that the CSA opinion was erroneous and that the trial court's opinion on other grounds was in conflict with another decision of this Court, the matter should be summarily reversed and remanded to the Circuit Court for Baltimore County for a trial on the counter-suit.

Respectfully submitted,



MICHAEL T. BENSON
2703 Waco Court
Baltimore, MD 21209
(301) 484-0358
Counsel of Record
and for Petitioners

APPENDIX

1a

ANNE RAUSEO,	*	IN THE CIRCUIT COURT
Plaintiff	*	FOR BALTIMORE COUNTY
vs.	*	AT LAW
MICHAEL THEODORE	*	File No. 104949
BENSON and	*	Docket No. 128
NANCY JOY BENSON,	*	Folio 228
his wife,	*	
Defendants	*	
* * * *	*	
* * * *	*	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT
AND OVERRULING PLEA OF LIMITATIONS

This case having come on for hearing on April 3, 1981, on the defendants' Motion for Judgment (paper #5) and Motion for Summary Judgment (paper #12), the court having examined the pleadings, the transcript of the Distric Court case of Benson v. Ashman, et al., case number 22182-78, in the District Court of Maryland for Baltimore City, and having interrogated both the plaintiff's counsel and the defendants, it is this 10th day of April, 1981, ORDERED by the Circuit

Court for Baltimore County, pursuant to Maryland Rule 610, d, 3, that:

1. The following issues, having been previously litigated in a Court of competent jurisdiction, are not at issue in the present case (13 M.L.E. Judgments, Sections 189, 201 and 210):

a. The roof leak and resulting water damage (Tr. 2).

b. Damage to the wall (Tr. 3).

c. The dryer (Tr. 6).

d. The voltage in the electrical system of the house (Tr. 7).

e. Drainage work along the left side of the house (Tr.8).

2. Defendants' Plea of Limitations (paper #5) is overruled.

3. Defendants' Motion for Summary Judgment is otherwise denied.

/s/ Paul E. Alpert
PAUL E. ALPERT
JUDGE

OPINION AT JUNE 11, 1985 HEARING ON
MOTIONS FOR SUMMARY JUDGMENT FOR
COUNTERDEFENDANTS AND FOR C. E. MENTZER

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

ANNE RAUSEO

*

Plaintiff/
CounterDefendant

*

*

vs.

*

MICHAEL THEODORE BENSON,*
ET AL.

* Case No.104949/
128/228

Defendants/
CounterPlaintiffs

*

vs.

*

CHARLES EDWARD MENTZER

*

CounterDefendant

*

* * * * *

Tuesday, June 11, 1985

BEFORE:

THE HONORABLE WILLIAM M. NICKERSON, Judge

THE COURT: The case of Bogley v.

Middleton Tavern, it is within the last
few years--I know it because I represen-
ted Mr. Bogley in this case. Mr. Bogley

was an insurance agent for Middleton Tavern, for an insurance company, and he negligently failed to provide some insurance to Middleton Tavern which burned.

There wasn't any questions about his negligence, at least in the jury's mind there wasn't any question about his negligence; but the principle that evolved from that case was he was acting for Aetna Insurance Company, and that fact was known to Middleton Tavern that he was acting for Aetna a disclosed principle; and therefore, could not be personally liable.

It seems clear to me Mr. Mentzer was acting for Mrs. Rauseo. You knew he was acting for her. She was a disclosed principle, and that exonerates him from any personal responsibility.

MR. BENSON: Contradictory to the

rationale that is clear in AmJur, and also against the rationale that is in the restatement of torts under abuse of process.

THE COURT: I can only refer you to Bogley v. Middleton Tavern.

MR. BENSON: Is that the context of negligence, not intentional tort, both intentional torts?

THE COURT: All right, sir. Was there anything else that you wanted to say?

MR. BENSON: Let me just check one moment. That's it.

THE COURT: On your motion for summary judgment as to the amended counterclaim filed on May 28th, 1985 on behalf of Ann Rauseo and Charles Edward Mentzer, the motion will be granted.

On the motion also filed May 28th, 1985 on behalf of Charles Edward Mentzer individually, motion will be granted.

OPINION AT JULY 12, 1985 HEARING ON
MOTION TO ALTER, AMEND OR REVISE ORDER
FOR SUMMARY JUDGMENT

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

ANNE RAUSEO,
 Pltf/CtrDef

*

v.
 M.T.BENSON, ET UX.,
 Defs/CtrPltfs

*

Case No. 10494
 128/228

v.
 C.E.MENTZER
 CtrDef

*

*

*

*

*

Friday July 12, 19

BEFORE:

THE HONORABLE WILLIAM M. NICKERSON, Judge

THE COURT: All right. Mr. Benson, my ruling remains the same, and that is in this instance to deny your motion to amend or revise the rulings on those two motions for summary judgment.

You may well be correct about the inapplicability of the Bogley and Middleton Tavern principle, but notwithstanding that in my view there are no material facts to be decided, and the matter is

decided as a matter of law; and I am going to deny your motion.

MR. MENTZER: May I at this point--I have one comment that--in furtherance of Your Honor's decision. There is absolutely no evidence on his side as to any material fact that would support any of the allegations he has made in his declaration, and I offer to buttress that, his own deposition, which I took his deposition of him, second deposition, where I asked him what evidence there was. At no time did he ever give any evidence to support those allegations, and that includes what he said here today.

The only thing he has--what he said here today is he has nothing else. I want to buttress that, and I want it clear on the record in the event he sees

fit to appeal this thing.

MR. BENSON: I did have evidence Mr. Mentzer had seen the inspection report prior to settlement conference, which was indicative of the fact the dryer could not be hooked up and would provide knowledge the dryer was not switched between, contract date and settlement date; and these Exhibits are just full of materially inconsistent statements between both alleged co-conspirators.

THE COURT: Well, Mr. Benson, my view is that there may have been some evidence as you see it, but in my view there was no evidence of any material factual dispute for the trier of fact.

Motion will be denied.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1261

September Term, 1985

MICHAEL THEODORE BENSON, et ux.

v.

ANNE RAUSEO, et al.

Alpert,
Karwacki,
Wenner,

JJ.

PER CURIAM

Filed: April 22, 1986

The sole issue in this "abuse of process" case is whether the trial court properly granted summary judgment in favor of appellees, defendants below. For the reasons set forth below, we hold that it did and shall, therefore, affirm.

We need not repeat for counsel and the trial court the protracted and tortured procedural background of this case; a summary should suffice. The subject controversy had its roots in a contract to purchase real property, which was executed by the parties on July 21, 1977. After settlement on the contract, Anne Rauseo, the buyer, filed suit against Michael and Nancy Benson, the sellers, alleging fraud and fraudulent inducement. The parties arranged to settle the dispute in 1982, whereby the Bensons would pay \$1,500 in consideration of Rauseo dismissing the suit with prejudice. Sub-

sequently, however, the Bensons moved to set aside the settlement agreement. The trial court denied the motion and entered judgment for Rauseo, but was reversed on appeal to this court. On remand, the Circuit Court for Baltimore County granted the Bensons leave to file a counterclaim.

In the original counterclaim, the Bensons ("appellants") sued Rauseo for abuse of process. In an amended counterclaim, filed on January 7, 1985, the Bensons added Charles Edward Mentzer, Rauseo's attorney, as a party counterdefendant (together "appellees") and alleged abuse of process and civil conspiracy to abuse process. Paragraph 19 of the amended counterclaim pertains to the damages suffered by appellants as a result of the alleged abuse of process. It states:

That the Bensons appealed [the trial court's] December 22, 1982 decision¹ and the Court of Special Appeals of Maryland reversed [the trial court's] judgment. The Bensons incurred significant costs and Michael Benson entered his appearance as attorney for the appellants, expended over 1,000 (one-thousand) hours of work by researching the law applicable to the brief for the appellants, by drafting and redrafting the brief several times, and by preparing for the oral argument.

Appellees moved for summary judgment, which, after a hearing before Judge Nickerson, was granted.

Appellants' single contention, in their second trip to this court, is that summary judgment may not be granted where there is a genuine dispute as to material fact. We agree with this statement of the law, see Maryland Rule 2-501, but emphasize that the dispute must be to a material fact. In this case, there was

1

The decision referred to concerned the denial of the Bensons' motion to set aside the settlement, discussed supra.

no evidence of any dispute of material facts. We shall explain.

In Herring v. Citizens Bank and Trust Co., 21 Md. App. 517, cert. denied, 272 Md. 742 (1974), we noted that the three elements essential to sustain an action for abuse of process are:

(1) that the defendant made an illegal, improper, perverted use of the process, a use neither warranted nor authorized by the process, and

(2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted, or improper use of process, and

(3) that damage resulted to the plaintiff from the irregularity.

Id. at 534 (quoting 1 Am.Jur.2d, Abuse of Process 4 (1962)). As to the third element, we added, at page 536, that

[T]he injuries contemplated by this particular tort (and an indispensable element of it) are limited to an improper arrest of the person or an improper seizure of property. See 1 Am.Jr.2d, Abuse of Process

4, "Elements and requisites of actionable abuse," pp. 253-254:

"An action for abuse of process will not lie unless there has been either an injury to the person or to property; mere indirect injury to a person's business or to his good name is not sufficient. Indeed the view has been taken that in an action for abuse of process there must be an actual seizure of the property of the plaintiff or an arrest of his person."

The requirement that the plaintiff in an action for abuse of process demonstrate this particular type of damage has been discussed more often in the context of malicious use of process. See, e.g., Keys v. Chrysler Credit Corp., 303 Md. 397 (1985); Wesko v G.E.M., Inc., 272 Md. 192 (1974). As the Court of Appeals noted in Keys,

An action for abuse of process differs from actions for malicious prosecution and malicious use of process in that abuse of process is concerned with the improper use of criminal or civil process in a manner not contemplated by law after it has been issued, without the necessity of showing lack of probable cause or termination of the

proceeding in favor of the plaintiff, while actions for malicious prosecution and malicious use of process are concerned with maliciously causing criminal or civil process to issue for its ostensible purpose, but without probable cause.

303 Md. at 411.

Apart from these essential differences, the element of damages is similar. See Herring, 21 Md. App. at 536, 547-49. Thus, to better understand the damages element in abuse of process actions, we may look to the Court of Appeals' discussion in Keys, regarding the damages element in actions for malicious use of process, where it is stated:

Regardless of the attitude of the courts of other jurisdictions, concerning which there is much conflict, and regardless of the contrary view indicated in Restatement-Torts, Vol. 3, page 442, Maryland has steadfastly adhered to the so-called "English" rule that no action will lie for the malicious prosecution of a civil suit when there has been no arrest of the person, no seizure of the property of the de-

fendant, and no special injury sustained which would not ordinarily result in all suits prosecuted for like causes of action. . . .

The mere expense and annoyance of defending a civil action is not a sufficient special damage or injury to sustain an action for malicious prosecution.

Id. at 410 (emphasis added). See also Archway Motors v. Herman, 41 Md. App. 40 (1978), cert. denied, 284 Md. 741 (1979) ("Other than usual and ordinary court costs, the expenses of litigation -- including legal fees incurred by the successful party -- are not recoverable in an action for damages.").

Appellants fail to cite Keys, Wesko or Herring on this issue. Rather, they rely on Delisi v. Garnett, 257 Md. 4 (1970), and a single sentence from this court's recent opinion in Palmer Ford, Inc. v. Wood, 65 Md. App. 390 (1985). In Palmer, in discussing compensatory dam-

ages in an action for abuse of process, we said:

Once it has been established that legal process had been perverted by misapplication to an end for which that process was never intended, the abuser is liable for all the consequences that reasonably result from the process.

Id. at 397-98 (emphasis added). Appellants highlight the word "all" and assert that their legal expenses were consequences that resulted from the abuse of process. While appellees do not debate the cause or amount of these expenses, the highlighted language must be read in light of the previous cases, which expressly exclude legal expenses. Palmer Ford, therefore, provides no support for appellants. Neither does Delisi.

From this discussion, we may fairly state that a showing of special injury or of the two particular types of damages is material to recovering for abuse of pro-

cess. In the instant case, the record reveals no dispute as to the damages suffered by appellants as a result of the appellees' alleged abuse of process. In view of the undisputed fact that the only damages suffered were expenses incurred in the resulting civil action,² summary judgment was properly entered against the appellants; their amended counterclaim failed to demonstrate all three elements of abuse of process. Furthermore, because the second count, claiming civil conspiracy to abuse process, expressly incorporated the allegations from the abuse of process count, the second count must also fail.

JUDGMENT AFFIRMED; COSTS TO BE PAID
BY APPELLANTS.

2

When asked by the trial court to explain their damages, appellants included attorney's fees, court costs, printing costs, bonds to stay execution and interest. The filing of a bond to stay execution simply is not tantamount to a "seizure of property." All of these clearly lie within the type of expenses normally associated with litigation.

DENIAL OF MOTION FOR RECONSIDERATION

Court of Special Appeals
Annapolis, MD 21401-1698

May 15, 1986

Michael T. Benson, Esquire
2703 Waco Court
Baltimore, Maryland 21209

Re: Michael Theodore Benson et ux vs.
Anne Rauseo et al
No. 1261, September Term, 1985

Dear Mr. Benson:

Be advised that by Order dated May 15, 1986, this Court denied your Motion for Reconsideration of this Court's per curiam opinion filed on April 22, 1986. The mandate of this Court will issue in due course.

Yours very truly,

/s/ Howard E. Friedman
Howard E. Friedman
Clerk

HEF:ls

cc: Phineas S. Dixon, Esquire
Charles Edward Mentzer, Esquire

ORDER DENYING CERTIORARI PETITION

MICHAEL THEODORE	*	In the
BENSON et ux.	*	
	*	Court of Appeals
v.	*	
	*	of Maryland
ANNE RAUSEO et al.	*	
	*	Petition Docket
	*	No. 203
	*	September Term,
	*	1986
	*	
	*	(No. 1261, Sep-
	*	tember Term, 1985
	*	Court of Special
	*	Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the opposition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: July 24, 1986

ORDER DENYING MANDAMUS

MICHAEL THEODORE BENSON * IN THE
et ux.

* COURT OF

v.

* APPEALS OF

COURT OF SPECIAL APPEALS
OF MARYLAND

* MARYLAND

* Misc. No. 10

* September
Term, 1986

ORDER

The Court having considered the
petition for writ of mandamus in the
above entitled matter, and

The Court having also reviewed
its denial of the petitioner's certio-
rari petition in No. 203, September
Term, 1986, filed on June 4, 1986, it
is this 7th day of October, 1986

ORDERED, by the Court of Appeals
of Maryland, that the petition for
writ of mandamus be, and it is hereby
denied.

/s/ Robert C. Murphy
Chief Judge